No. 11,449

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FLOTILL PRODUCTS, INC.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR THE RESPONDENT FLOTILL PRODUCTS, INC.

J. PAUL ST. SURE,
EDWARD H. MOORE,
1415 Financial Center Building, Oakland, California,
JEFFERSON E. PEYSER,
Mills Building, San Francisco, California,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Other Authorities

No. 11,449

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FLOTILL PRODUCTS, INC.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR THE RESPONDENT FLOTILL PRODUCTS, INC.

I.

THE ISSUE.

The sole issue before this Court may be briefly stated as follows:

Where for 5 years an employer has had a closed-shop contract with the AFL, does the reaffirmation of the contract become a violation of Section 8(1) of the National Labor Relations Act merely because of the pendency before the Board of an unresolved question of representation?

II.

STATEMENT OF FACTS.

The Board on pages 2 to 7 of its brief, has set out a brief statement of what it calls "relevant and undisputed facts". The Board's statement of facts is misleading, particularly in omitting the crucial fact that for at least 5 years the respondent and the AFL had been parties to a *closed-shop contract* and that the contract attacked in these proceedings was merely an extension or reaffirmation of that contract. Respondent feels it necessary therefore to summarize the significant facts.

1. Origin of Bargaining Relationship.

The case presented to this Court is but one segment of a rather large picture of internecine labor strife that has plagued the California canning industry since 1938. See, for example, *Matter of Bercut-Richards Packing Co.* (1939), 13 N.L.R.B. 101, (1940) 22 N.L.R.B. 250; *National Labor Relations Board v. Bercut-Richards Packing Co.,* C.C.A. 9th, number 9499. Flotill Products, Inc., in its Stockton operation, first appeared as a part of this unhappy scene in 1939, when it entered into its first collective bargaining agreement with a labor organization affiliated with the American Federation of Labor. (R. 267.)

Flotill negotiated its first collective bargaining agreement with an AFL union in 1939, probably in March. (R. 267, 311.) The local union was Federal Local 20676, directly affiliated with the AFL. (R. 311.) This contract by its terms ran until March 1

of the following year, but was self-renewing unless 30 days' previous notice was given. (R. 275-6.)

2. Subsequent Bargaining History.

The practice of respondent was to execute a written stipulation adopting the master agreement established for the major part of the California canning industry by California Processors and Growers, Inc., on the one hand, and the California State Council of Cannery Workers on the other. (R. 304, 312.) Inasmuch as the master contract did not cover the full agreement with Local 20676 a separate contract was executed in July or August of 1941. (R. 312.) This supplement provided that all employees had to join and be members of the union before they went to work, and, further, that they had to remain members of the union as long as the contract remained in effect. This, too, was automatically renewed in the absence of a 30 day notice prior to March 1. (R. 313.) The supplement also provided that membership dues and initiation fees were deductible from wages and were to be paid by the Company to the union. (R. 276.) Neither the Company nor the union ever gave the required notice to terminate the arrangement under the master contract. (R. 276.) Because of an amendment to the master contract respondent and Local 20676 renewed their stipulation accepting the C.P. & G. "green book" agreement in March, 1943. (R. 312.) Throughout the year 1945, then, and until March, 1946, there were two documents embodying the contractual responsibilities of the Company and the AFL Local union; first, the stipulation of March

1943, adopting the C.P. & G. "green book" master contract, insofar as it was applicable; and second, the supplemental memorandum of July or August, 1941, which established a closed shop and check-off of union dues and assessments. (R. 311.)

In May and June of 1945, respondent received various written communications from the AFL advising that jurisdiction over the employees had been transferred to Local 601 of the Teamsters Union. (R. 278-9.)

About September 15, 1945, shortly after a meeting of the employees held at the Company cafeteria, two representatives of the local union, Mr. Brissey and Mr. Moeck, called on Mr. Arthur Heiser, respondent's Personnel Director and Assistant Secretary, and informed him that the membership of Local 20676 had voted unanimously to transfer to Local 601 of the International Brotherhood of Teamsters. (R. 279-80; 290-91; 294; 301-2.) Thereupon respondent addressed a letter to Local 601 recognizing that it was taking over the contract of Local 20676 (R. 284, 288) and thereafter respondent recognized Local 601 and the contract to the same extent as it had previously recognized the old local. (R. 284.)

3. Board Proceedings.

On July 3, 1945, a Petition for Certification of Representatives was filed by an organization designated as "Cannery and Food Process Workers", which purported to be affiliated with the "Cannery and Food Process Council of the Pacific Coast". (R.

509-10.) This Petition was filed with the Board's Twentieth Region in case number 20-R-1429. In addition to the petitioner group, "Cannery Workers Union Local 20676 and/or International Brotherhood of Teamsters, Chauffeurs, Helpers and Warehousemen" are listed as claiming to represent the employees at respondent's plant.

Following conclusion of a hearing the Board directed that an election be held among respondent's employees by telegraphic order of October 5, 1945. A formal written decision issued on October 12, 1945 (R. 48), and an election was held at respondent's Stockton plant on October 15, 1945. (R. 325.) Results of the balloting were as follows (R. 89):

Approximate number of eligible voters	305
Valid votes counted	205
Votes cast for AFL	105
Votes cast for CIO	100
Votes cast for Independent	0
Votes cast against participating labor organizations	0
Challenged ballots	20
Void ballots	7

Objections to the election were filed by the AFL, and on February 15, 1946, the Board vacated and set aside the election at respondent's plant, along with all others similarly held, because of substantial possibilities of error arising out of its directives for the holding of the elections.

4. The 1946 Contract.

On March 5, 1946, respondent executed a memorandum agreement with California State Council of Cannery Unions, AFL, and Cannery Workers' Union, Local 601, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL, the substantive provisions of which are as follows (R. 128-9):

> 1. It shall be a condition of employment with the employer that all employees covered by this agreement shall become and remain members of the Union in good standing. Present employees who are not as of the date of this agreement members of the Union must become members within ten (10) days from the date hereof. Any new employees shall be required within ten (10) days of the date of hiring to become a member in good standing.
>
> Persons who fail to maintain good standing in the Union in accordance with the By-Laws thereof shall be discharged within thirty-six (36) hours after the company is so notified by the Union.
>
> In the hiring of additional employees, the employer shall give preference to unemployed members of the local Union provided such individuals have the necessary qualifications and are available within forty-eight (48) hours after being notified. As a basis for preferential consideration unemployed members of the local Union shall be required to present a clearance card from the local Union, evidencing the fact of their paid-up membership.

2. Any adjustment in wages, hours, or conditions, which may hereafter be agreed upon by the parties, shall be effective as of March 1, 1946, and retroactive to that date.

Both the Trial Examiner and the Board which approved his findings, expressly found that prior to the time the contract of March 5, 1946, was signed the respondent and the AFL had been parties to a closed-shop contract. The Trial Examiner (R. 94-95) concluded:

> "The Board alleged that respondent violated Section 7 of the Act by discharging Sandrio on November 17 or 18, 1945. Respondent averred he was discharged on request of the AFL for not being in good standing in that union and thus pursuant to their closed-shop contract which provided that employees had to join the AFL and remain members thereof. There was testimony that such a contract was in effect *which the undersigned credits.* The Board decision in the Bercut-Richards case which was issued February 15, 1946, stated, 'Moreover, no requests for discharges resulting from activity in the election are justified even under the present (closed-shop) agreements.' This decision did not issue until months after Sandrio's discharge but the case law upon which that statement was based is well established. However, there is no showing that Sandrio was active in or even participated in the election, while the record clearly shows that on a statement by the AFL that he was not in good standing with them, respondent discharged him pursuant to their contract and the undersigned so finds."

The Board (R. 75) adopted the findings, conclusions and recommendations of the Trial Examiner with certain additions and modifications. The Board did not modify the Trial Examiner's finding of a prior closed-shop contract and therefore adopted that finding.

It is plain, therefore, that the inference in the Board's brief that the respondent had granted a new closed-shop contract to the AFL is contrary to the fact. In at least one place in its brief (Board brief, page 30) the brief incorrectly states "that the employer had gone beyond the requirements of the old agreement." This statement is incorrect.

The Board found that merely because respondent continued to contract with the AFL, it had interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act. The Board ordered respondent to cease and desist (1) recognizing the AFL as the collective bargaining agent of its employees, (2) giving effect to its contract with the AFL, and (3) in any like or related manner interfering with, restraining or coercing its employees; to withdraw and withhold recognition from the AFL unless and until it should be certified, and to post notices to its employees. All of this is directed on the theory that such an order is necessary in order to protect the right of respondent's employees to be represented by a union of their own choice. Respondent's employees had freely selected the AFL as their bargaining agent, had been represented by the AFL

for approximately 7 years and had never repudiated that choice.

To repeat then, the sole issue before this Court is as follows:

Whether respondent was forbidden by law to extend its collective bargaining relationship with the AFL, including the closed-shop which had existed for a period of 5 years, during the pendency of a question concerning representation. The contract of March 5, 1946, merely reaffirmed and extended an existing relationship. The Board argues that the law required respondent to abandon the existing relationship. The respondent argues that it was permitted, if not required, to maintain the status quo unless and until the Board had designated a new bargaining representative.

III.

THE BOARD'S "CEASE BARGAINING" DOCTRINE IS NEITHER REQUIRED NOR PERMITTED UNDER THE ACT.

A. PRACTICAL RESULTS OF "CEASE BARGAINING" DOCTRINE.

Before we turn to the legal foundation for our contention that the Board's order here is against law, let us see how it works in practice.

We have here a case where an employer dealt with an AFL union on an exclusive basis from the inception of their bargaining relationship in 1939. Since 1941, the employer had granted to this union both a

closed shop and a dues check-off (R. 274-276, 311-313). In the sense that these contractual conditions eliminated the necessity of membership solicitation by the AFL, the collective bargaining relationship was self-policing for a period of years. It remained unchanged until May or June of 1945 (R. 278-279) when respondent learned of a change in the organizational affiliation of the contracting local union. Soon thereafter, on July 3, 1945, a petition for certification of representatives was filed by an independent labor organization designated as the Cannery and Food Process Workers of the Stockton area (R. 509-10; the Board is in error when it states at page 3 of its Brief that the petition was filed by the CIO), and from that point, as far as respondent is concerned, the trouble started. Following a hearing in which a number of similar proceedings were consolidated, the Board, on October 5, 1945, directed an election. (64 N. L. R. B. 133.) Although the earliest date on which unilateral termination of the contract could have been effected was March 1, 1946, the Board at that time saw no reason to disturb the contractual relationship between respondent and the AFL in any respect whatsoever. And had the Board been able to set up and conduct a fair and proper election the issues now before this Court would not have been created, nor would the illogic of the Board's position be so convincingly demonstrated. The AFL union received at least a plurality of the valid votes cast, but because of "such a possibility of error" through defects in the Board's Direction of Election the entire election was

vacated and set aside on February 15, 1946. (65 N.L.R.B. 1052, 1058.)

This left respondent in the unhappy position of having an outstanding collective bargaining agreement (which earlier could have been terminated by appropriate notice, effective March 1, 1946) with the AFL, of having the election issue still unresolved by the Board, and of having its 1946 operating season only a matter of days ahead. If we correctly understand the Board's position, the Board would have compelled respondent to take either of two courses: one, terminate its contract unilaterally on March 1, in a manner not contemplated by the contract, and refuse to deal with any union until the Board unsnarled its tangle; or, two, terminate at least the preferential features of its AFL contract, and treat with all comers upon identical terms. To terminate the contract would have constituted a complete and effective denial to respondent's employees of their rights, under the Act, to bargain collectively. To deal with all unions would have created the inconceivable condition of having several bitterly contesting groups claiming to represent employees, each striving to obtain an advantage from respondent and each striving to outdo the other, but with none entitled to secure a single benefit to the exclusion of the other. This course also would have had the effect of automatically placing the CIO (an organization which, incidentally, had not even initiated the representation proceeding and which had made no claim to speak for any of respondent's employees as late as July 3, 1945) on a full

parity with the AFL which had maintained an exclusive contractual status in the plant for six years.

The only realistically neutral position for respondent to take, then, was to maintain the status quo until such time as the Board with due deliberation should determine that a different representative should speak for the employees. This position it took, and the record shows without contradiction that neither by act nor by contract did respondent confer additional recognition or extend new privileges to the AFL. Respondent left the contesting unions as it found them; to have done otherwise would have been to establish for the CIO a status to which it could lay no claim save through the mechanical act of participating in someone else's (the Independent Cannery and Food Process Workers Union) representation proceeding.

The propriety of respondent's position insofar as the National Labor Relations Act is concerned is pretty well demonstrated by the history of the cannery cases since March 5, 1946. In brief review, here is the sequence:

1. In the matter of *National Labor Relations Board v. Bercut-Richards Packing Co.*, C.C.A. 9, No. 9499, the Board attempted to charge a number of respondent's fellow cannery employers (all of whom had been involved in the Bercut-Richards representation proceeding) with a contempt of this Honorable Court in executing preferential agreements with the AFL in March, 1946. The Board claimed that this violated

an earlier consent decree, but on July 15, 1946, this Court denied the Board's petition, thereby adjudicating that execution of these other 1946 contracts did not violate the Act. (The contempt proceeding will be discussed more fully later in this Brief.)

2. The Board directed a second election to be held at respondent's Stockton plant on August 31, 1946.

3. At the second election the balloting was as follows:

Votes for AFL	535
Votes for CIO	358

4. In September, 1946, the CIO filed objections to the conduct of the election.

5. Finally, on January 20, 1948, the Board dismissed the representation proceeding. (Daily Labor Report, Jan. 20, 1948, p. A-8.)

It is now three years since the right of the respondent and the AFL to bargain collectively was first questioned. It is now the third canning season since the Board suggested to respondent that it might "recognize each (union) as a representative of its members." If respondent had adopted the Board's view on this issue its employees would still be without an effective representative for purposes of collective bargaining. If this Court should enforce the Board's order there will be no effective bargaining representative until a union (presumably the AFL) again petitions the Board for certification of representatives and the Board, after due deliberation, determines that a certification shall issue.

All in the name of "effectuating the policies of the Act."

The primary objective of the National Labor Relations Act is the promotion of the orderly processes of collective bargaining, as a means of advancing industrial stability and security of employment. Respondent accomplished this objective back in 1939 when it recognized the AFL union as the exclusive representative for purposes of collective bargaining of the employees in the Stockton plant. For six years thereafter respondent bargained with the AFL. During this period a whole pattern of industrial democracy was built up within the plant. Wages, hours of employment, and working conditions were fixed by mutual agreement with union representatives. Shop stewards were chosen to represent employee interests within the plant, and a procedure was developed to handle employee grievances. Union spokesmen had access to the plant and met freely with management. These processes made the collective bargaining principle a living, functioning program, which is precisely what the Act contemplated. But the Board says all this must stop. The Board says there must be several unions in the plant, each speaking for its membership, until the Board determines which is to be declared the winner. This evidently contemplates separate grievance procedures for each union. It is no more feasible to have several labor organizations functioning within the same unit at the same time than it is to have several different courts adjudicating the same case at the same time.

So with the Board's order. If respondent is to be compelled to deal on equal terms with several groups for the same employees there will be industrial chaos with a complete collapse of the collective bargaining which the Act was designed to promote.

In a sense, two conflicting policies are involved in a case such as this: The policy favoring stability of labor relationships, and the policy favoring the right of employees to change their minds about their bargaining representatives.

One function of a labor organization is to establish terms and conditions of employment, which may be fixed for a specified term. Inasmuch as the relation ship for an entire unit must be determined by a majority within the union it is impossible to have a complete and unrestrained freedom of choice in selecting the representative. The alternative would be industrial chaos. Collective bargaining would be stultified if the majority status of a union were to be subject to constant questioning. The Board itself has stated the problem:

> "The Board was often called upon to determine whether an election could appropriately be held where there was an outstanding contract between the employer involved and a union other than the petitioner covering the employees in issue; or where there was an outstanding recent Board certification of another union as the bargaining representative of the employees concerned. In deciding whether a dismissal of the petition or the direction of an election would best effectuate the policies of the act, the Board weighed the interest

of the employees and the public in preserving the industrial stability implicit in the established bargaining relationship or the certified representative status of the union against the statutory right of employees freely to select and change their bargaining representatives.

"The Board held that, in general, a valid written collective bargaining agreement, signed by the parties, extending for a definite and reasonable period, and prescribing substantive terms and conditions of employment, constituted a bar to a current determination of representatives among the employees covered by such contract until shortly before its terminal date. And, as noted in previous annual reports, this rule applied equally to newly executed agreements and to those renewed pursuant to the operation of automatic renewal clauses."

National Labor Relations Board, Twelfth Annual Report, p. 9.

In a number of specific instances the Board has refused to give effect to a change in employee choice. The problem in connection with existing certifications is recognized by the Board in *Matter of Reed Roller Bit Company,* 72 N.L.R.B. 927:

"To have insisted in the past upon prolonged adherence to a bargaining agent, once chosen, would have been wholly incompatible with this experimental and transitional period. It was especially necessary, therefore, to lay emphasis upon the right of workers to select and change their representatives. Now, however, the emphasis can better be placed elsewhere. We think

> that the time has come when stability of industrial relations can be better served, without unreasonably restricting employees in their right to change representatives, by refusing to interfere with bargaining relations secured by collective agreements of two years' duration."

It would be quite a different story if, before executing its first agreement with any labor organization, an employer were confronted with claims of majority status by two unions, and he then granted exclusive recognition to one of them, while the right to represent the employees remained unresolved. Such a contract would confer a standing upon the newly recognized union which it did not have before, and would be taken by the employees within the bargaining unit to demonstrate a preference by the employer for the union so favored. This was precisely the situation involved in the *Matter of Midwest Piping & Supply Co., Inc.*, 63 N.L.R.B. 163. The picture is quite different, however, where an employer has maintained exclusive contractual relations with a union over a period of years, and merely reaffirms the established conditions at a time when its exclusive status is under question. In the case at bar, for example, the AFL acquired its contractual standing in 1939, and nothing that respondent did in 1945 or 1946 either added to or detracted from that standing. Any act merely maintaining a long established condition should be interpreted as a recognition of the status quo pending a demonstration that the contracting union has lost its exclusive right to represent the

employees. Otherwise, the mere filing of a petition by a contesting union would strip the contracting group of all the effectiveness that it had built up over a period of years, and would give to the petitioning union a most substantial advantage in soliciting support from the employees.

The Board will entertain a representative petition, supported by only 30 percent of the employees in a unit. (National Labor Relations Board, Statement of Procedure, 29 Code Fed. Reg. Part 202, § 202.16.) Here the CIO made no substantial showing of representation before the election (R. 29), while the Independent, which did, received no votes. (R. 89.) Yet the Board would require the Company to deal with both the CIO and the Independent on an equal footing with the AFL which had represented respondent's employees for years.

Such a contest is in many respects comparable to a political campaign, in which an incumbent serving for a fixed term is being challenged. The party on the inside is restricted in his campaign by his actual record of performance; the one on the outside, however, has no limitations on the criticism to be made of the incumbent or on the promises of performance —always *in futuro*—tendered as bait for the votes. If the established union has made a bad record a petitioning group will be at no disadvantage in enlisting support, whether or not a contract has been renewed during the contest. An exclusive status resulting from an actual and proven majority representation should not be nullified by the mere filing of a petition.

The Board's Midwest Piping doctrine can only lead to the filing of petitions for the purpose of creating an artificial parity with the established union and gaining a grace period for organizing activities. Such a rule would be an invitation to politically minded unions to raid established organizations. There is nothing to lose; file a petition, then organize with the support of the Board's Midwest Piping and Supply doctrine. Instability, such as that experienced by the California Canning industry, is an inevitable result.

B. THE BOARD RECOGNIZES THE DANGERS IN THE DOCTRINE.

During recent months it has been increasingly apparent that the Board, while doing "lip service" to the Midwest Piping doctrine, has in fact been seeking all possible grounds for avoiding its application. A case disposed of by the Board within the year is the *Matter of Ensher, Alexander & Barsoom, Inc.*, 74 N.L.R.B. 1443, another in the cluster of California cannery cases. There a Trial Examiner found that a representation petition was filed in the summer of 1945; that the AFL and an independent union appeared on the ballot; that the AFL received a clear majority of votes cast but that the election was set aside (for the same reason as in the case at bar); and that on February 27, 1946, the employer executed a closed shop contract with the AFL, before resolution of the representation issue. At that time the CIO had made no showing of membership in the plant, but

it later charged the employer with committing an unfair labor practice in executing the agreement. The Trial Examiner concluded that execution of the 1946 contract while a representation issue was unresolved was an unfair labor practice under the Midwest Piping doctrine. The Board reversed the Trial Examiner and held the Midwest Piping doctrine to be inapplicable because of the fact that prior to execution of the contract the contesting independent union had become defunct, and the only union shown by the record to have existed in the plant when the agreement was executed was the AFL.

The Board added (74 N.L.R.B. 1445):

> "That (Midwest Piping) doctrine, necessary though it is to protect freedom of choice in certain situations, *can easily operate in derogation of the practice of continuous collective bargaining, and should, therefore, be strictly construed and sparingly applied.*" (Italics added.)

The Board stated that the signing of the contract should not be regarded as an unfair practice "even though it be technically true that the representation proceeding was still pending before the Board. There was then in actual fact no real question concerning representation of the respondents' employees to be resolved." The fact of the matter is, in August of 1946 the Board directed the conduct of an election on the petition filed by the independent union with both the AFL and the CIO, but not the independent, on the ballot. (*Matter of Bercut-Richards, et al.*, 20-R-1414, et al., second direction of election, August 16, 1946.)

Therefore, contrary to what the Board states, there must have been in actual fact a question concerning representation and the Board so recognized. The decision in the *Ensher* case was issued on August 21, 1947.

A more recent case is *Matter of Ellis Canning Company,* 76 N.L.R.B. No. 13, decided February 11, 1948. (This employer was not involved in any of the Bercut-Richards proceedings.)

There a closed shop contract had been in effect with an AFL union for several years, following a certification issued by the Board. It was renewed in 1944, but in February, 1945, a letter was sent to the employer by the union "to the effect this Union will not insist on compliance concerning this Article (closed shop) unless the Union can replace the person it asks to be discharged by a person of like qualifications." The contract, including the closed shop feature, was thereafter renewed to run until July 1, 1946. On January 12, 1946, the CIO commenced an organizing campaign. On January 19, 1946, the AFL notified the employer to enforce the closed shop provision and get all employees in the union within 30 days. On January 21 the CIO filed a representation petition with the Board and notified the employer that it claimed to represent a majority of the employees. Following a refusal to enforce the closed shop provision the plant was shut down because of an AFL picket line. The plant reopened in April, 1946, but only those employees who joined the AFL were hired back. An election was held by the Board in May, but was inconclusive. The issue was stated as follows: "With a valid closed shop con-

tract existing, but with the closed shop provision not having been enforced by agreement between the contracting parties, can these parties in the face of a pending representation proceeding, by oral agreement, decide to enforce the closed shop provisions and require all employees to join the contracting union?" The *Midwest Piping, Bercut-Richards* and *Phelps-Dodge* cases were all discussed. The Board upheld the Trial Examiner, who had found no violation of the Act by reestablishment of the closed shop condition, in language as follows:

> "Clearly respondent herein knew a 'real question' concerning representation existed when it agreed with the AFL in April 1946, to enforce the closed-shop provision of its contract. Obviously also enforcing this provision was not extending or renewing an existing contract or entering into a new one. If knowledge of the question concerning representation forecloses the respondent from enforcing the closed-shop provision on request of the Union, the doctrine of the *Phelps-Dodge* case is extended. In other words, in so holding the undersigned would be deciding that 'If, during the pendency of an election directed by the Board to resolve a question of representation, an employer extends or renews an existing contract with a labor organization *or enforces a provision of an existing contract not theretofore enforced since the signing of that contract*—he violates the Act, insofar as that organization is accorded recognition—or employees are required to become or remain members thereof.' Such an extension of the recog-

nized doctrine seems to the undersigned to be unsound."

In the present case, all the company did was to continue the enforcement of a closed shop contract which had been in force for a number of years. Certainly if the test of the legality of the company's conduct is, as the Board's brief argues, whether or not it constitutes a departure from neutrality, during pendency of a dispute concerning representation, the conduct of the respondent in the present case comes much closer to the ideal standard of neutrality. The respondent here maintained the status quo during the pendency of the question concerning representation. The conduct of the company in the *Ellis Canning* case altered the status quo to the prejudice of the petitioning CIO Union and to the assistance of the contracting AFL Union, but such conduct was held valid. If the conduct of the company in the *Ellis* case was not a forbidden departure from the standard of neutrality imposed by the law *a fortiori* the conduct of respondent was legally permissible.

A third case is *Matter of Eaton Manufacturing Company,* 76 N.L.R.B. #40, decided February 20, 1948. In the *Eaton* case the AFL union's exclusive bargaining status remained unquestioned from 1941 until April, 1946. A two year contract, expiring on May 15, 1946, required maintenance of membership in the union and compelled union affiliation for new employees upon completion of a probationary period. On April 8, 1946, the CIO

filed a petition with the Board for certification of representatives and so notified the employer on the following day. Vigorous campaigns for support were thereafter waged by both unions. The AFL demanded dismissal of a number of active CIO supporters, but partly because of a restraining order, and because of a belief that dual unionism was the real basis for the invocation of the maintenance of membership provision of the contract, the employer refused to effect discharges. On May 13, 1946, the employer and the AFL executed a new contract, for a two year period, with substantially the same conditions as the expiring agreement including an identical maintenance of membership provision. It was agreed, however, that the status of the AFL union was to be contingent on the results of the representation proceeding and a complaint case then pending before the Court. Upon the effective date of the new agreement the employer dismissed certain employees upon demand of the AFL for failure to retain good standing. The Board charged that the dismissals, certain remarks of a superintendent, and execution of the new agreement on May 13, 1946, all constituted violations of the Act. In finding that execution of the 1946 contract violated the Act the Trial Examiner found as follows:

> "The second is based upon the respondent's execution of the May 1946 Master Agreement with the AFL. This exclusive collective bargaining contract containing provisions which conditioned employment on continued member-

ship in the AFL was made in the face of the CIO representation petition and the CIO unfair labor practice charge, both of which were pending undetermined before the Board at the time the contract was executed, and at a time when the respondent was aware, as evidenced by the stipulation executed simultaneously therewith, that there existed a real question concerning representation affecting its Saginaw employees. Under the circumstances and for the reasons expressed in the *Midwest Piping* case, the principle of which is clearly controlling here, the undersigned finds that the respondent, by its conduct in executing the Master Agreement in May 1946, contravened the letter and spirit of the Act, breached its obligation of neutrality, indicated its approval of the AFL, accorded the AFL unwarranted prestige, encouraged membership in the AFL, discouraged membership in the CIO, and thereby rendered unlawful assistance to the AFL.

* * * * * * *

Equally without sound basis is the contention made by the AFL that the *Midwest Piping* doctrine should in no event be applied in a case where the processing of a representation petition has been delayed by the filing of a charge by the petitioner, and particularly so where the charge is subsequently found to be unsupported. The AFL argues that the application of that doctrine in such a situation would encourage petitioning unions to continue to engage in 'dog in the manger' tactics, such as the Board condemned in the *General Electric X Ray* case, and would permit them in effect to circumvent the

> rule of that case by filing delaying charges, in order to gain additional time for organizational activities. While the possibility of abuse of the Board's process by such tactics cannot be ignored, the solution is not to be found in the suggestion of the AFL that the Board uphold contracts made in the face of pending representation proceedings where the filing of charges by the petitioner has intervened. That in effect asks the Board to relinquish its protection of employee rights against employer interference. Rather, it lies in administrative vigilance in guarding against abuse of the Board's process and in the expeditious processing of cases. * * * Moreover, as the Board found in the *Midwest Piping* case, where a somewhat similar argument was advanced, the fact, 'that no unfair labor practices are found * * * on the original complaint does not alter the effect of the respondent's later breach of its neutrality obligation.' "

When the case came before the Board for decision, these findings of the Trial Examiner were completely reversed. The Board disposed of the Midwest Piping problem in the following language (*Matter of Eaton Manufacturing Company,* 76 N.L.R.B. #40, page 6):

> "The Trial Examiner found that the respondent violated Section 8 (1) of the Act by executing the 1946 agreement with the UAW-AFL while the UAW-CIO's previously filed representation petition was pending before the Board undetermined. Because of the UAW-CIO's subsequent conduct in preventing a prompt determination by filing an unfair labor practice charge against the respondent which we find to be groundless, we do not adopt this finding."

Although the Board elsewhere invalidated the contract upon the ground that it was executed by both parties as a means of securing dismissal of certain employees, it is apparent that the principle of the *Phelps Dodge, Midwest Piping, Bercut-Richards* and *Flotill* cases was summarily overruled. As in the cases named, there was a representation question pending before the Board when the contract was signed.

The Board justified its refusal to follow its "well established" cease bargaining doctrine on the ground that the CIO's conduct prevented a prompt determination of the question concerning representation. In the present case, as appears from the record, a prompt determination of the question concerning representation was likewise rendered impossible by circumstances beyond the respondent's control. In fact, in January of 1948 the question concerning representation still had not been resolved and the petition was then dismissed. If, as the Eaton decision implies, the cease bargaining doctrine is not to be followed in those instances in which a prompt determination of representatives is not possible, then the doctrine should not be applied to the conduct of the respondent in the present case.

The most significant conclusion which may be drawn from the recent Board decisions cited above is that the cease bargaining doctrine is actually not a rule of law invariably applied whenever the same circumstances arise, but that it is an arbitrary principle which may operate in derogation of the practice

of collective bargaining, and which, therefore, is sparingly applied; which the Board follows under some circumstances, but which it may refuse to follow under similar circumstances. The law must be uniformly and fairly applied—it must be certain. Such an arbitrary principle cannot be judicially sanctioned. *N.L.R.B. v. North American Aviation, Inc.*, 136 F. (2d) 898, 7 Labor Cases 64,853.

C. THE DECISIONS RELIED UPON BY THE BOARD DO NOT SUPPORT THE BOARD'S CONTENTIONS.

The Board, at page 8 of its Brief, tries to give this case the appearance of being a routine application of elementary and well established principles under the National Labor Relations Act. The Board says (Brief, p. 8):

> "This case presents no novel questions. It is, as the Board pointed out (R. 75-77) and we shall later show, consonant with well-established doctrine long ago enunciated by the Board and uniformly approved by the courts."

We respectfully take issue with the statement that this case involves merely "well-established doctrine" of the Board, and that such doctrine has been "uniformly approved by the Courts."

As we have seen, the Board itself is shying away from its "well established doctrine;" first by recognizing its dangers in the *Ensher, Alexander & Barsoom* case; second, by refusing to apply it to a material change in actual employment conditions be-

cause of the existence of an inactive contractual provision, in the *Ellis Canning Company* case; and third, by simply looking the other way, in the *Eaton Manufacturing Company* case.

At page 18 of its Brief the Board says that its finding "that the actual grant of formal recognition to one of several competing unions pending the resolution of a question concerning representation constitutes unlawful assistance, has been upheld in the two cases involving this principle which have thus far come before the courts". The cases cited are *N.L.R.B. v. John Engelhorn & Sons,* 134 F. 2d 553, 556 (C.C.A. 3); and *N.L.R.B. v. Southern Wood Preserving Co.,* 135 F. 2d 606, 607 (C.C.A. 5). Neither case is in point; in the *Engelhorn* case the Court refused to discuss the issue; in *Southern Wood Preserving Co.,* neither a previous contract nor other unions were involved in the Board's order.

In the *Engelhorn* case an AFL union had had a contract with the employer which ran until November 1, 1938, subject to automatic renewal in the absence of previous notice. No notice was ever given. In April, 1941, the CIO began to organize the employees and requested a bargaining conference with the employer. This was refused on the ground that the 1938 agreement was still in effect. On May 13, 1941, the employer was notified of the pendency of a representation petition filed by the CIO. On May 19 most of the employees went out on strike but on May 29 the employer and the AFL, with knowledge of the pendency of the representation question, signed a

new contract providing for a closed shop. Thereafter the Board conducted a hearing on the representation petition and held an election which the CIO won. The employer refused to bargain with the CIO and dismissed four employees pursuant to its closed sh contract with the AFL. As a defense to a Board order requiring their reinstatement the employer urged the AFL closed shop contract. The board argued that the contract was invalid, and on the issues so raised the Court stated:

> "The first (argument) is that the employer may not raise for his protection in this proceeding a closed shop contract made with Local 174 (AFL) at a time when the employer knew that an investigation and certification proceeding, instituted by a rival labor organization claiming a majority of the employees, was pending. The Board, in accordance with its previous decisions, so held. *This proposition of law does not seem to have been squarely decided by any court decision. Nor need we decide it here, for we consider the second line of attack sufficient.* We think, as did the Board, that the agreement was invalid in view of the employer's activities attending its execution." (134 Fed. 2d at 555-56. Italics added.)

> "The case is thus one where the employer negotiates a closed shop contract with a labor organization which he assisted by conduct defined by the Act to be an unfair labor practice. Such a contract is invalid under the proviso of § 8 (3) of the Act (citing cases), and cannot operate as a bar to proceedings before the Board." (134 F. (2d) at p. 557.)

The Court in the *Engelhorn* case thus expressly *refused* to consider the "well-established doctrine" advanced by the Board here.

In the *Southern Wood Preserving* case, the employer, in September, 1941, had contracts with an AFL union which included closed shop and check off provisions. The contracts were to expire on October 11, 1941. On September 17, 1941, a CIO union notified the employer that it represented a majority of the employees, and on September 18 the CIO petitioned the Board for certification of representatives. On September 29, 1941, the employer made a new contract with the AFL union; the plant was closed for several hours to enable employees to vote on it, three foremen advised employees to attend the ratification meeting if they wanted to keep their jobs, and a foreman referred to CIO posters as "foolishness which would have to stop or something would have to be done about it". In November, 1941, the employer enforced the closed shop agreement and discharged 19 men. Thereafter the CIO won a Board election, the employer negotiated with it and reinstated the men. Another employee, allegedly discharged for cause, was not reinstated.

The Board order was limited to a restraint against discouraging membership in the CIO, or any other labor organization, by discharging or otherwise discriminating against employees, and directed reinstatement of the one employee with back pay. No reference was made to the AFL union or to the contract executed with it in September, 1941. (45 N.L.R.B.

239-40.) The employer urged that the matter had become moot because of recognition of the CIO union and reinstatement of the men, but the Court pointed out that one man had not yet been restored to work. Said the Court:

> "We think also that the circumstances, especially the discharge of Turner, and the premature signing of a new contract with the Engineers union and the unusual facility afforded of shutting down the plant to vote on it, are sufficient to show a support by the employer of that Union as against its rival, contrary to the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. Financial support is not the only kind of support forbidden." (135 F. (2d) at p. 607.)

The *Southern Wood Preserving* case presents another employer who has rendered unlawful support to a contract union and whose bargaining contract is thereby vitiated. To that extent it is comparable to the *Engelhorn* case. But as neither the Board's decision nor the Court's opinion mentions the earlier contract or the previously contracting AFL union, the *Southern Wood Preserving* case lends no support to the Board's claim that its "well-established doctrine" has been "uniformly approved by the courts." The case obviously did not involve the cease bargaining doctrine.

D. THE BOARD'S "CEASE BARGAINING" DOCTRINE IS INCONSISTENT WITHIN ITSELF.

Logically the Board's doctrine in this case is impossible to support. The Board says that respondent must remain neutral pending the outcome of the representatiton question, but at the same time keep the 1945 contract in effect until March 1, 1946, with its substantive provisions intact, and then says that from March 1, 1946, on, respondent cannot even reaffirm what has already existed for six years.

1. The Law Required Respondent to Bargain Under Its Valid Contract.

Even under the Board's order in the instant case, and the Bercut-Richards orders which preceded it, there was nothing to stop the customary functioning of the bargaining relationship between respondent and the AFL until at least March 1, 1946. The obligation of an employer to bargain collectively is a continuing duty, and it is not satisfied merely by the execution of a contract. The Board has said, in its Ninth Annual Report:

> "The employer is under a further duty to negotiate concerning the modification, interpretation and administration of the existing agreement." (National Labor Relations Board, Ninth Annual Report, p. 46.)
>
> "By signing a trade agreement an employer does not purchase immunity from the requirements of good faith and honest negotiation which are basic to Section 8 (5) of the Act * * *" (*Matter of George E. Carroll,* 56 N.L.R.B. 935.)

The nature of the obligation was more extensively discussed by the Circuit Court of Appeal for the Third Circuit in *N.L.R.B. v. Newark Morning Ledger Co.*, 120 F. (2d) 262, certiorari denied 61 S. Ct. 363, wherein the Court said:

> "Furthermore, it may at any time become desirable or indeed necessary to bargain collectively for the modification of an existing collective agreement which has proved in practice to be in some respects unfair or unworkable or for the adjustment of complaints or alleged violations of such an agreement. Collective bargaining is thus seen to be a continuing and developing process by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned. It is not a detached or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result." (120 F. (2d) 264.)

2. The Board Recognizes a Continuing Obligation to Bargain Despite the Representation Issue.

In its orders in the *Bercut-Richards* representation cases, to which respondent was a party, the Board expressly recognized an obligation upon respondent to observe all its contractual responsibilities with the AFL until March 1, 1946. In its Decision, Direction of Election, and Order of October 12, 1945, the Board said (R. 26):

> "However, any certification of representatives which may issue as a result of the elections hereinafter directed shall be solely for the purpose

> of designating a bargaining representative to negotiate a new agreement *to become effective upon the expiration of the existing contract.*" (Italics added.)

If the Board had had the capacity, prior to March 1, 1946, to cope with the problem which it was creating the issues raised by its *Midwest Piping* doctrine would have become moot. But unfortunately for the Board, and for the canners, and for the unions, and for the employees themselves, the Board, instead of solving the problem, made a bad situation worse. Whatever the reason, the Board was unable to set up an adequate election procedure for the balloting in October, 1945, and the following February the Board was compelled to observe:

> "We therefore are constrained to conclude that the balloting was not conducted in accordance with our usual standards or under conditions tending to create confidence in the result or to lay the foundation for satisfactory bargaining. We are of the opinion, therefore, that the purposes of the Act will be best served by setting aside all of the elections held herein." (R. 58.)

Thereupon the Board recognized the continuing nature of respondent's obligations under the existing contracts, and, mounting its snow-white steed, rode off furiously in all directions at once:

> "While we view the record as requiring this result, we reach it with considerable reluctance because it means that the employees will have no bargaining representative to negotiate an exclusive collective agreement to cover the coming season,

until a new election can be held which may result in one of the rival unions being certified. The current A.F.L. contract will expire March 1, and since the legal effect of the foregoing determination is to keep the question of representation pending before the Board, none of the unions is entitled to an exclusive status as the bargaining agent after that date. In accordance with well-established principles,[14] the employers may not pending a new election, give preferential treatment to any of the labor organizations involved, although they may recognize each one as the representative of its members. In this state of the record, no legal effect may be given the closed-shop provision contained in the current collective agreements after their expiration date;[15] the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in Subsection 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive conditions of employment now existing by virtue of the foregoing agreements."

Matter of Bercut-Richards Packing Co., Supplemental Decision and Order, 65 N.L.R.B. 1052, 1057-58; R. 58-59; issued February 15, 1946.

---

[14]See *Matter of Midwest Piping & Supply Co., Inc.,* 63 N.L.R.B. 163. See also *Matter of Ken-Rad Tube & Lamp Corp.,* 62 N.L.R.B. 21.

[15]Moreover, no requests for discharges resulting from activity in the election are justified even under the present agreement. See *Matter of Rutland Court Owners,* 44 N.L.R.B. 587, 46 N.L.R.B. 1040.

3. The Board's Policy is Against Logic.

To summarize then, the law required the respondent to continue to bargain collectively with the AFL despite the pendency of the representation case. The Board recognized that this obligation existed at least up until March 1, 1946. The Board would terminate not only respondent's obligation to bargain, but also its right, and the rights of the AFL to continue to bargain as of that date merely because of the pendency of the representation proceeding. The unhappy dilemma in which respondent found itself on February 15, 1946, points up the utter illogic in the *Midwest Piping* doctrine and its application to this case. Here was an employer who had conferred an exclusive and unquestioned recognition upon the AFL continuously since 1939, with a closed shop and dues check-off in effect continuously since 1941. The master industry contract, adopted by respondent and the AFL, was self-renewing in the absence of certain affirmative action to be undertaken by either party upon termination of negotiations. The closed shop supplement remained in effect as executed in 1941, because it, too, was self-renewing and neither party took steps to terminate it or modify it. Because the Board was unable to resolve the representation issue it endeavored to create, with one mystic pass over its crystal ball, a condition of neutrality intended to be all things unto all men. First: the existing contract was to remain in full effect until March 1, 1946. Second: the closed shop provision could be enforced up to March 1, 1946, but not thereafter. Third: Dis-

charges ostensibly under the closed shop clause, but actually because of election activity, could not be justified even prior to March 1, 1946. Fourth: after March 1, 1946, none of the unions was entitled to an exclusive status as bargaining agent. Fifth: after March 1, 1946, each union could be recognized as the representative of its members. Sixth: the decision did not require change in the substantive conditions of employment then existing by reason of the current collective bargaining agreement.

The Board advances its *Midwest Piping* doctrine as a necessary element in its "doctrine of employer neutrality." (Board's Brief, p. 9.) We might agree that where an employer has not previously dealt with unions, his initial expression of preference could be improper if made during pendency of the representation question. We might also agree that the conferring of an additional privilege or benefit to an "in" union could be improper if extended during the pendency of the question. But what, we ask, is improper, or unneutral, in continuing the established relationship with the old union? What did respondent give to the AFL on March 5, 1946, that the AFL did not have on February 28, 1946? Nothing.

We say that there is no logic in the Board's position here. If respondent is guilty of an unneutral act in giving effect to a long-established closed shop condition on March 1, 1946, why is it not also guilty of an unneutral act in giving effect to the closed shop condition on February 28, 1946? Or on February 15, 1946, when the Board set aside the first election?

Or on October 15, 1945, when the Board held the first election? Or on July 3, 1945, when the representation issue was first raised?

If the AFL is properly entitled to an exclusive recognition on July 3, 1945, and on October 12, 1945, and on February 15, 1946, what would make such recognition so noxious on March 1, 1946?

If the obligation of respondent to bargain collectively with the AFL continued from July 3, 1945, to February 28, 1946, during all of which period the representation issue was before the Board, by what process does that obligation cease on March 1, 1946?

We submit that there is nothing in law or in reason to give any such significance to the first day of March —nothing save the administrative fiat of the Board.

The Board's grave concern over employer neutrality is groundless, as the record itself will demonstrate. The CIO union was able to secure, prior to September 11, 1945, a total of 10,128 designations from among 32,287 employees of members of the C.P. & G. unit. (R. 28.) Although respondent was not a member of the C.P. & G. unit the position of the AFL in both cases was quite similar. The fact that the AFL had had an exclusive bargaining status within the C.P. & G. for about eight years did not restrain the "out" union from making a substantial showing.

Furthermore, the one thing employees are most concerned about is their job security during an inter-union election campaign. If they can be sure that their union activity will not result in discrimination

because of employer displeasure they have a very real protection which affords them a positive advantage in their electioneering. As the Board pointed out in its Supplemental Decision of February 15, 1946 (R. 59), such protection exists under its *Rutland Court* doctrine, approved by this Court in *N.L.R.B. v. Portland Lumber Mills,* 158 Fed. (2d) 365. Under that doctrine an employee may not be discharged under a closed shop contract if the reason for the discharge is known to be dual unionism by the employee. Such protection to the members of the contesting union is all that they legitimately need, and all that they are entitled to under the Act.

E. THE "CEASE BARGAINING" DOCTRINE IS CONTRARY TO LAW.

1. The Law Does Not Require Certification by the Board as Condition Precedent to Bargaining.

The normal collective bargaining relationship is initiated without the formality of a Board hearing and certification. In the usual case a union makes a showing to the employer sufficient to convince the employer that it has authority to speak for the employees, and from that point forward the bargaining relationship proceeds. If the union were required to go through a representation proceeding and an election before it could bargain with the employer the Board would be swamped with representation cases. No such folly was intended by the Act.

The Board itself recognizes that a contract with a union lacking a certification is perfectly valid if the union represented a majority at the time the contract was made. In fact, the Board will even presume that the union represented a majority, and will reject proof to the contrary. In the *Matter of Electro Metallurgical Company,* 72 N.L.R.B. 1396, at page 1399, the Board said:

> "As to the contention that the Intervenor did not, on the date when the contract was executed, represent a majority of the employees in the unit, it is the practice of the Board in representation cases, at least so far as the question of a bar to a proceeding is concerned, to presume the legality of a collective bargaining agreement and to refuse to admit evidence on the question whether, at the time the contract was executed, a majority of the employees covered by such contract had designated the contracting unit as their bargaining representative. Accordingly, we find that this position of the Petitioner is untenable."

Any other policy would give an unwarranted weight to certifications in cases where there is no evidence of unlawful assistance and would put a premium on arbitrary insistence upon resort to Board procedure, to the discouragement of voluntary bargaining.

2. The Board's Direction to Bargain With Several Unions is Contrary to Congressional Intent.

The policy of the Act is to encourage bargaining with representatives of a majority of the employees within a unit. Of necessity this policy precludes a bargaining with two unions. The impossibility of a

dual bargaining relationship was in the minds of the Congress at the time the Act was adopted, and the intent to outlaw it is plain. In discussing the majority rule features of Section 9 (a) of the Act the Report of the Senate Committee on Education and Labor (Senate Report no. 573, 74th Congress, 1st session) says, at page 13:

> "The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is well nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions."

Again the House Committee on Labor (House of Representatives, Report no. 1147, 74th Congress, 1st Session, at pages 20-21) makes the following observations on the principle of majority rule:

> "The misleading propaganda directed against this principle has been incredible. The underly-

ing purposes of the majority rule principle are simple and just. As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer. There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

"It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining. If, however, the company should undertake to deal with each group separately, there would result the conditions pointed out by the present National Labor Relations Board in its decision in the *Matter of Houde Engineering Corporation* (1 N.L.R.B. 35 (Aug. 30, 1934)):

" 'It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the committees. * * * Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks.'

"Speaking of the company's suggested alternative that it deal with a composite committee made up of representatives of the two major conflicting groups, supplemented by other individual employees, the Board pointed out:

" 'This vision of an employer dealing with a divided committee and calling in individual employees to assist the company in arriving at a decision is certainly far from what section 7 (a) must have contemplated in guaranteeing the right of collective bargaining. But whether or not the workers' representation by a composite committee would weaken their voice and confuse their counsels in negotiating with the employer, in the end whatever collective agreement might be reached would have to be satisfactory to the majority within the committee. Hence the majority representatives would still control, and the only difference between this and the traditional method of

> bargaining with the majority alone would be that the suggestions of the minority would be advanced in the presence of the majority. The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only what he has no right to ask for, namely, dissension and rivalry. * * *' ''

The Act itself is plainly lacking in any declaration, either express or implied, that an employer should change the status quo during pendency of a representation issue. And the Congress did not want the Board to attempt to write into the Act what Congress had omitted. The Senate Committee said:

> *"Sections 7 and 8. Rights of employees—Unfair Labor practices.—*
>
> These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in section. 8. This is made clear by paragraph 8 of section 2, which provides that 'The term "unfair labor practice" means any unfair labor practice listed in Section 8', and by Section 10 (a) empowering the Board to prevent any unfair labor practice 'listed in Section 8.' Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. *Neither the National Labor Relations Board nor the Courts are given any blanket authority to pro-*

hibit whatever labor practices that in their judgment are deemed to be unfair. Secondly, as will be shown directly, the unfair labor practices listed in this bill are supported by a wealth of precedent in prior Federal law." (Report of Senate Committe on Education and Labor, supra, pp. 8-9. Italics added.)

3. The Courts Have Uniformly Frowned Upon the "Cease Bargaining" Doctrine.

(a) Consolidated Edison Company v. N.L.R.B.

The United States Supreme Court has passed upon an almost identical situation in *Consolidated Edison Company v. N. L. R. B.*, 305 U. S. 197, 83 L. ed. 126.

On May 5, 1937, a CIO union filed a charge with the Board alleging that Consolidated Edison Company was violating the Act in interfering with employee organization, and in supporting an AFL union. Between May 28, 1937, and June 16, 1937, the Company executed its first collective bargaining agreements with the AFL—contracts which for the first time recognized the AFL as the representative of its members, established wages and working conditions, and contained no-strike provisions. The proceeding initiated by the CIO was pending before the Board at the time these agreements were negotiated. Following a hearing to which the AFL was not made a party the Board issued an order which, among other provisions, found that the Company had not dominated or interfered with any labor organization, and directed that the Company cease giving effect to its AFL contracts. The AFL union represented about

80 per cent of the employees eligible for membership in it. The Board sought to justify its order setting aside the AFL contracts on the ground that it would effectuate the policies of the Act, under Section 10 (c). On this issue the Court made this statement which is most significant here:

> "Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of § 10 (c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." (305 U.S. at pp. 235-36; 83 L. ed. 143.)

The Court goes on to indicate that a majority once established and recognized by the employer retains its standing until another agency supplants it in the manner set out in the Act.

> "The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9 (c). Upon this record, there is nothing to show that

the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. *The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.*

"We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

"Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood 'as the exclusive representative of their employees' stands on a different footing. The

> contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. Section 9. We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law." (305 U.S. 237, 238-39; 83 L. ed. 144, 145 (Italics added.).)

The logic of the Supreme Court's decision is directly applicable here. The disruption of respondent's contracts even pending the representation proceedings would remove their protection during the intervening period. The policy of the law required the continuance of these contracts and not their abrogation.

(b) N.L.R.B. v. McGough Bakeries Corp.

N.L.R.B. v. McGough Bakeries Corp., 153 F. (2d) 420, involved a contest between a CIO union and an independent union. In 1942, at a time when the CIO was the only labor organization contesting for the right to represent employees, a strike had been called and to induce resumption of work the employer agreed to a closed shop contract with the CIO. Both

the Board and the Circuit Court of Appeals determined that the closed shop contract was invalid because the CIO was not shown to be the representative of a majority of the employees at the time it was made. During this period the Board declined to investigate the question of representation because only one union claimed bargaining rights.

The closed shop agreement with the CIO was renewed on May 10, 1942, for a three year period. In February, 1943, some of the employees established an independent union and asked for bargaining privileges, claiming to represent a majority. The Company refused to negotiate with the Independent because of the outstanding closed-shop contract, and suggested that the Independent file a representation petition with the Board. Such a petition was filed by the Independent on March 5, 1943, but the CIO filed a charge that the Independent was company-dominated. The Board did not act on either petition. On May 15, 1943, after expiration of the CIO contract, the Independent and the Company commenced bargaining with the result that a closed-shop contract was signed with the Independent for the first time. Discharges made pursuant to the Independent's closed-shop contract served as the basis of a complaint issued by the Board.

The Board found that the Independent was company-dominated, made no finding as to whether the Independent represented a majority at the time its contract was signed in May 1943, and applied the Midwest Piping doctrine, saying:

> "However, on May 15, 1943, shortly after the expiration of the (CIO) Union's closed-shop contract, *notwithstanding the pendency of the aforementioned representation petition* and unfair labor practice charge, the respondent, hastily and without requiring proof of the Independent's alleged majority status, entered into an illegal closed-shop contract with the Independent, as found in the Intermediate Report." (Italics added.)
>
> 58 N. L. R. B. 848, 851.

The Circuit Court held that as a matter of law the record demonstrated that the Independent represented a majority of the employees at the time of its closed-shop contract in May, 1943, and that the record failed to show it to be company-dominated, stating:

> "The trial examiner next brings forward the fact that the Independent was contracted with. *It had a right to be, since it was in fact the majority representative.*"
>
> 153 F. (2d) at 424.

The Board, at pages 19-20 of its Brief (footnote 9), has anticipated our reference to the *McGough* case with the declaration that it "simply did not involve an adjudication of the validity of the doctrine of the instant case". On the contrary, the Board invoked the Midwest Piping doctrine, but the Court, although not making direct reference to it, upheld the questioned contract because it was made with a union entitled to speak for all the employees. Significantly, too, in the *McGough* case the action which the Board

questioned and which occurred during the pendency of the representation issue consisted of an exclusive recognition by the employer and a closed-shop contract. With but a single act the employer gave the Independent virtually all that could be given to it. In the base at bar, however, respondent Flotill Products, Inc., merely maintained the *status quo*.

The Board would have this Court ignore the pendency of the representation issue as a factor in the *McGough* case because "* * * the Board did not thereafter act upon the petition because preliminary investigation indicated to it that the contracting union was illegally dominated. The unprocessed petition was regarded as having lapsed at the time the contract was entered into". Careful reading of the Trial Examiner's Intermediate Report, the Board's Decision and Order (58 N.L.R.B. 848), and the Circuit Court's opinion fails to show any basis whatsoever for these statements by the Board's counsel in its briefs.

4. Two Cases Decided by this Court are Contrary to the Board's Decision in this Case.

On at least two occasions this Court has declined to approve the "well established principle" invoked by the Board.

(a) N.L.R.B. v. Pacific Greyhound Lines, Inc., 106 F. (2d) 867, decided September 19, 1939.

In December, 1936, the Board had issued an order directing Pacific Greyhound to cease discouraging membership in the Brotherhood of Enginemen or any other labor organization, from encouraging member-

ship in the Drivers Association or any other labor organization, and from otherwise dominating any labor organization or interfering with the rights of employees under the Act. The Board's order was thereafter enforced by decree of this Court.

Upon entry of the decree both the Enginemen and the Drivers Association ceased to have any relations with Greyhound or its employees. At a time prior to April 21, 1937, a number of employees affiliated with the Amalgamated Association of Street, Electric Railway and Motor Coach Employees, and a collective bargaining agreement was executed by Amalgamated and Greyhound. On September 7, 1937, a new agreement was signed, to remain in effect until December 31, 1938. This provided for the exclusive recognition of the Amalgamated, and was self-renewing in the absence of 60 days' notice prior to December 31. At the same time it was agreed that within 30 days after approval of the arrangement by the members of Amalgamated and notice thereof to Greyhound, membership in the union would be required as a condition of employment. This arrangement became effective by agreement on April 15, 1938.

In June, 1938, a new union entered the picture, the Brotherhood of Railway Trainmen. The Trainmen and Amalgamated both filed petitions for certification with the Board, and, following a hearing, the Board issued a direction of election on October 29, 1938. Prior to the elections and on or before October 31, 1938, the closed-shop agreement was extended for an additional year and was modified so that it could be

terminated by either Greyhound or the then bargaining agent for the men, Amalgamated, on 60 days' written notice from either party to the other.

The Board claimed that this modification constituted a violation of this Court's earlier decree, and sought to have Greyhound adjudged in contempt. Greyhound moved to dismiss the Board's petition upon the ground that it did not set forth facts showing a violation of the decree. This Court granted Greyhound's motion, and on the subject of the effect of the pendency of the representation question upon the modification of the agreement in October, 1938, had this to say:

> "We are unable to find in this modification of the agreement any justification for the Board's charge that it constituted a contempt of our decree or any violation of the Act. On the contrary, it seems in aid of the Act's declared purpose of a speedy disposition of labor disputes. *We regard the contract, as modified, then to be binding on the employees and on the company and not affected by the fact that undetermined proceedings were pending before the Board.* Consolidated Edison v. N.L.R.B., 305 U. S. 197, 237."
>
> 106 F. (2d) at p. 869. (Italics added.)

The Board asserts that the *Greyhound* case did not involve the Board's cease bargaining doctrine. A careful examination of the pleadings and briefs in that case discloses that the Greyhound Company argued that the law did not require it to cease bargaining collectively with the Amalgamated despite the pendency of the representation proceedings while the

Board argued that to continue to bargain collectively with the Amalgamated during the pendency of the representation proceedings was contrary to law, and likewise contrary to the decree of this Court. This Court in dismissing the Board's petition held expressly in the language quoted above that it regarded the contracts as binding on the employees and on the company, and not affected by the fact that representation proceedings were pending before the Board, citing the *Consolidated* case. The cease bargaining doctrine, therefore, was considered and explicitly rejected by this Court in the *Greyhound* case.

(b) N.L.R.B. v. Bercut-Richards Packing Co., C.C.A. 9, No. 9499, decided July 15, 1946.

On May 23, 1946, the Board filed with this Court in the above case its "Petition For Rule To Show Cause, To Adjudge In Contempt And For Other Relief". In sum the Board requested the Court to find that certain activities of the California Processors and Growers, Inc., its members and certain specifically named canners, principally the renewal and enforcement of their contract with its union shop provisions, violated a decree of the Court entered on July 15, 1940. Pertinent portions of the decree appear in the Appendix to this Brief at pages i-iii. The petition sets out at some length the conduct alleged to be a violation of the decree. It is sufficient for present purposes to say that the petition recites in detail the claim of the Board, which is the principal basis of the proceeding here before the Court, that during the pendency of the representation proceed-

ing the employers could not without violating the law (and the decree) renew their contract with the AFL and continue to make it effective.

The respondents filed a lengthy return and answer to the Board's petition which related at considerable length the history of the relationship between respondents and the AFL, and which vigorously defended the continuance of the bargaining relationship during the pendency of the representation issue. The AFL was granted leave to file a petition in intervention which raised the same issue.

The Board moved to strike the respondents' answer and asked for a summary adjudication on the pleadings, claiming that the admission of continued bargaining pending the representation issue constituted a minimum showing of a violation of the decree. (Board's Motion to Strike, etc. proceeding No. 9499, pages 9-10.) Briefs were filed in which the principal issue discussed was whether continued recognition of the AFL after March 1, 1946, while the representation question was unresolved, was a violation of the decree and the Act. (The parties treated the decree and the Act as coextensive for the purposes of that proceeding.)

On July 15, 1946, this Court denied, without opinion, the Board's petition to adjudge the respondents in contempt. The Board requested a clarification on July 23, 1946, upon the stated ground the Board could not determine whether the Court's action was intended to decide the legality of the execution of the

1946 contracts and thereby bar the Board from questioning these contracts in other proceedings then pending before the Board. The request for clarification was likewise denied.

Under these circumstances we take the dismissal of the contempt proceeding to be an adjudication on the merits, under Rule 41(b) of the Federal Rules of Civil Procedure which by rule of this Court have been made applicable.

> "* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Compare

> *Napa Valley Electric Company v. Railroad Commission,* 251 U. S. 366, 64 L. ed. 310;
>
> *Lyons v. Perrin & Gaff Manufacturing Co.,* 125 U. S. 698, 31 L. ed. 839.

By rule the presumption is thus conclusive and irrebuttable that the disposition of the contempt case constituted an adjudication of the validity of the 1946 contract between the AFL and other California canners, and that the continuance of negotiations while the Board attempts to dispose of a representation question does not violate the National Labor Relations Act. Because of the identity of the issues the contempt adjudication is a decision directly in point rejecting the Board's "cease bargaining" doctrine.

IV.

THE BOARD'S BRIEF.

We have already commented on the inadequacies of the statement of facts found in the Board's brief, and in view of the extended argument upon the merits we hesitate to make a point-by-point reply to the Board's argument. The Board is plainly wrong, or misleading, in so many of its conclusions, however, that a short reply is essential, even at the risk of repetition. All page references, unless otherwise noted, are to the Board's Brief.

Pages 7-8. We agree with the Board that employer neutrality is essential in the selection of bargaining representatives. We renew our contention, however, that by maintaining the status quo this respondent took the only course which constituted a *de facto* neutrality. To have changed the long-established relationship with the A. F. L. would have been an unwarranted and improper discrimination against it.

The reference to *International Association of Machinists v. N.L.R.B.,* 311 U. S. 72, 78, is inapposite here. That case involved a closed shop contract executed with a union found by the Board to have been unlawfully assisted by the employer, and the assistance vitiated the contract. In the case at bar the "employee choice" was expressed in 1939, and a termination of the relationship on March 1, 1946, would have been taken as evidence of an employer prejudice against the established union.

Pages 9 to 11, Importance of Neutrality. We agree that when employees are about to express a preference for a union the employer must "remain scrupulously aloof." Again, we say that by maintaining the status quo respondent observed this condition to the letter. On this subject the Board makes two observations:

One, that where only one union is a candidate for employee favor the employer cannot participate in the contest. This rule, which is indeed a well-established doctrine, is not in issue in this proceeding. The cases cited by the Board all involve instances of direct employer statement of preference, discharges or other discrimination to influence employee choice, refusal to bargain, or other forms of interference with or domination of a contesting union.

And, two, that where more than one union is competing the employer may not become a participant by giving to either union an advantage or disadvantage over the other. Here the respondent Flotill gave nothing to either group during the pendency of the representation question. What the A.F.L. obtained from Flotill it obtained in 1939 and 1941, and not in 1946.

Except for the *Waterman* case the decisions cited by the Board all involve campaigns of employer interference with employee choice by such activities as supervisorial comment, discrimination against employees, and threats of reprisal for unapproved selection of unions. None of these factors is involved in this case. In *N.L.R.B. v. Waterman Steamship Corp.,*

309 U. S. 206, 84 L. Ed. 704, the employer, a steamship company, had denied to a contesting union the right to send representatives aboard ship to make contact with the men, while such access was accorded the contracting union. Because of the nature of the employment this amounted to an effective isolation of the employees from all influences save those of the employer and the contracting union. It was in that connection that the Court said (309 U. S. at p. 226):

> "Enough has been shown to establish the reasons for the Board's decision that if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C. I. O. and the A. F. L."

Significantly in the case at bar the Board expressly absolved Flotill of failing or refusing to give the C. I. O. union proper access to the employees or to the plant premises. (R. 92.)

Pages 11 and 12. Here the Board reviews its findings very unfairly. The Board says that on March 5, 1946, respondent "entered into a contract with the AFL. . . . granting it not only an exclusive recognition but also a closed shop for an indefinite period." (Board's Brief, p. 10.) This is not true. The grant of exclusive recognition to the A.F.L. was made in 1939; the grant of the closed shop contract was made in 1941, not in 1946, and the Trial Examiner expressly found that there was a prior valid, closed-shop contract. (R. 95.) Furthermore, on March 5, 1946, the only incident that occurred was a reaffirmation of the

continuing closed-shop arrangement; the basic collective bargaining agreement, which established the exclusive recognition, was self-renewing, and was not modified, or even negotiated, in 1946. On page 10 the Board says that respondent "granted 'potent assistance'" and conferred the additional advantage of a closed shop. We repeat: In March, 1946, respondent conferred nothing on the A. F. L. that the A. F. L. had not enjoyed over a period of years, including the period of the hearing on the representation issue and the conduct of the first election.

Pages 12 to 14. The Board says that exclusive recognition may be conferred only upon a union whose majority status is free from doubt. In this case when recognition was conferred, in 1939, there was no doubt as to majority status of the A. F. L. The respondent neither granted to, nor bestowed upon, the A. F. L. any advantage in 1946. The cases cited by the Board on this subject involve either an employer establishment of a contending union, or an initial recognition or other advantage conferred during a dual union contest.

Pages 14 to 20. The Board says that the "grant" to the A. F. L. of exclusive recognition constituted unlawful assistance. Our observations on the Board's views on this subject have been too often stated to require repeating here. Again, the precedents relied on by the Board all involve instances of unlawful assistance to employer-dominated company unions, or the initial establishment of advantages to a contest-

ing union. The *Waterman* case (supra, p. 59) has nothing to do with the issues raised here, as we have pointed out, and upon the question of union access to employees (the point involved in *N.L.R.B. v. Waterman*) the Board itself has already found in favor of Flotill. The *Engelhorn* and *Southern Wood Preserving* cases are discussed supra at pages 29-32.

Pages 20 to 23. The Board says the grant of a closed shop in 1946 was unlawful assistance to the A. F. L. Here again the Board argues as though the 1946 memorandum gave the A. F. L. something new, but that simply isn't the fact. On page 21, the Board says:

> "How much more corrosive of that freedom (of choice) is the imposition upon the employees of a *new* closed shop contract during such a critical period." (Italics Board's.)

A closed-shop status continuous from 1941 is not new when reaffirmed in 1946.

The Board says that this memorandum enabled the A. F. L. to "pick and choose the electorate in the forthcoming election by preventing the employment of its opponents, by compelling all employees to join its ranks, and by holding 'in terrorem of discharge' those employees who supported its rival in the pre-election campaign." (Board's Brief, pp. 20-21.) That is not true, and the Board knows it. Under the Rutland Court doctrine, 44 N.L.R.B. 587, 46 N.L.R.B. 1040, initiated by the Board and approved by this Court, *Local 2880 v. N.L.R.B.,* 158 F. (2d) 365, an

employer cannot, even under the closed shop contract, discriminate against an employee because of the latter's advocacy at, or near, election time, of a union other than that holding the closed shop. The employee can be as extravagant as he cares to be on behalf of the "out" union and the employer cannot use a loss of union membership resulting therefrom as grounds for dismissal if there is reason to believe that the loss of membership was precipitated by the activity on behalf of the contesting union.

Furthermore, the electorate was shaped by the substantive provisions of the C. P. & G. contract itself, which the parties retained in effect and which the Board expressly sanctioned. (R. 59.) The "Green Book" contract provides a rather complete seniority system. Section 9 of the "Green Book" (FTA-CIO Exhibit 2, at pages 16-18, R. 307) requires an employer to fill all jobs and do all rehiring from persons on a seniority list. Inasmuch as the seniority list had been built up over a period of years the electorate was largely frozen as a result of the closed-shop contract which was unquestionably valid even as late as February 28, 1946. It would be a grievous error to say that either Flotill or the A. F. L. had any material opportunity to shape an electorate in 1946. Between the Green Book contract and the Rutland Court principle the employer was powerless to interfere, and without employer assistance the A. F. L. could compete for favor only upon terms which at the most were no more favorable than those available to the C. I. O.

Pages 23 to 27. The Board says that an inconclusive election did not operate to restore majority status to the A. F. L. We do not contend that it did. We contend that in order to void utter industrial anarchy the status quo of necessity should be maintained until the Board affirmatively finds that the A. F. L. lost its majority. The major portion of the Board's argument on this subject has been discussed earlier in this brief, and will not be repeated here.

On page 24 the Board says: "The question of whether the A. F. L. still commanded the requisite majority was raised by the C. I. O. through the appropriate statutory procedure. . . . " This is not a correct statement. The representation proceeding was initiated by the independent Cannery and Food Process Workers Union, Stockton area, and the Board expressly found that even at the conclusion of the hearing the C. I. O.'s showing of representation at Flotill was not substantial. (R. 29.) The record gives no indication as to the fate of the Independent or the circumstances under which the C. I. O. entered the proceeding at Flotill.

At page 26 the Board says that the returns of the first election "showed that a majority of the employees did not favor either union." This, again, is not correct. The election returns showed (R. 67) that of the 205 valid votes counted by the Board, the A. F. L. received 105, or a clear majority. Twenty votes were challenged. The Regional Director recommended that challenges as to five employees be upheld, leaving 15 valid ballots in addition to those

already counted. (R. 359-64.) Had these been counted the total valid votes would have been 220, and if the A. F. L. had received but six out of the additional 15 it would have received a majority of all votes cast. This shows just the opposite of the statement of the Board that a majority of the employees favored neither union. However, for reasons never disclosed to respondent the Board declined to count the challenged ballots.

The Board says, at page 26-27, that "by recognizing the A. F. L. in the face of a pending representation proceeding before the Board, respondent, far from complying with its obligation under the Act, arrogated to itself the function of determining the question of majority status, 'which Congress entrusted to the Board alone' ". If the determination of majority status is "entrusted to the Board alone" then it was wrong for Flotill to recognize the A. F. L. as exclusive bargaining agency in 1939. Obviously the Act does not purport to bar the parties from determining these questions independently of the Board, as long as no unfair labor practice is committed in the establishment of majority status. Furthermore, the Board has approved the exclusive recognition had by the A. F. L. in 1945; if such recognition was lawful at the time of the first election in October, 1945, what makes it unlawful in 1946?

Pages 27 to 37. The Board argues that the doctrine of this case is not inconsistent with the policy of stability of bargaining relationships. We agree with the Board that the policy of the Act is to guarantee to

employees the right to bargain through representatives of their own choosing, and that is precisely what the employees did here. They chose the A. F. L., and they were entitled to bargain through the A. F. L. until a proper showing was made that a different union had been selected.

The Board's argument in this case is founded upon a false premise: The Board assumes that in 1946 Flotill gave the A. F. L. a standing it had not previously enjoyed in the plant. As we have seen, that was not the fact. Indeed, the Board erred in its observations in the Supplemental Decision and Order of February 15, 1946 (65 N.L.R.B. 1058) where it stated that the old contract would come to a close on March 1, 1946; the basic Green Book contract had been automatically renewed by failure of the parties to take steps to terminate it in December, 1945, and the supplemental closed shop agreement of 1941 was automatically renewed on January 30, 1946, for the same reason. When the Board issued its Supplemental Decision the contract had therefore been frozen until March 1, 1947.

The Board argues that certain supplemental matters added to the record are not material. We respectfully submit that they are highly pertinent, however, as they demonstrate pretty conclusively the viciousness in the practical operation of the Midwest Piping doctrine to this case. It is difficult to see how the Board can claim that there is no interference with the stability of bargaining relationships when the application of the Board's rule would have meant

a complete denial of effective bargaining from March 1, 1946, to January 20, 1948, and for as long thereafter as the Board would have failed to certify the bargaining agency. The record speaks all too plainly on this issue.

Other matters in this part of the Board's Brief have already been fully discussed.

CONCLUSION.

The sole issue before this Court is whether Flotill should maintain the status quo in its bargaining relations pending final resolution of a representation issue initiated by a petition now dismissed filed by a union now defunct. No doubt the Board anticipated that its first elections of October 1945 would lead to a prompt and conclusive determination of the rights and obligations of all the parties, and on this premise the Board recognized the propriety of maintaining the status quo until March 1, 1946. Solely because of its own administrative errors, however, the Board failed to perform its statutory function in this regard, with the result that when March 1, 1946 arrived the Board's self-reversals had made the issues more complex than ever. The Board thereupon determined to place Flotill in the impossible situation already discussed at length, and asks this Court to aid the Board in preventing Flotill from following the only course which was realistic, and, we believe, proper under the Act.

For the reasons heretofore stated we submit that Flotill was not only entitled to maintain existing conditions—it was obligated to do so by law. This Court should therefore deny enforcement of the Board's order.

Dated, June 25, 1948.

J. Paul St. Sure,
Edward H. Moore,
Jefferson E. Peyser,
Attorneys for Respondent.

(Appendix Follows.)

Appendix.

Appendix

PORTION OF DECREE OF JULY 15, 1940, IN NATIONAL LABOR RELATIONS BOARD v. BERCUT-RICHARDS PACKING CO., ET AL., NO. 9499, CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

AND IT IS FURTHER ORDERED THAT:

1. Respondent, Bercut-Richards Packing Co., its officers and agents, successors and assigns, shall cease and desist from:

(a) Discouraging or encouraging membership in any labor organization of its employees, by discharging or refusing to reinstate any of said employees, or in any manner discriminating with respect to their hire or tenure of employment or any term or condition thereof because or on account of their membership in, activity on behalf of or sympathy toward any such labor organization;

(b) Urging, persuading, warning or coercing its employees to join or not to join any labor organization of said employees, or threatening said employees with discharge if they join or fail to join any such labor organization;

(c) Interfering with the formation or administration of any labor organization of its employees, or contributing financial or other support thereto;

(d) In any manner interfering with, restraining or coercing its employees in their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their

own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act.

2. Respondent, Bercut-Richards Packing Co., its officers and agents, successors and assigns, shall take the following affirmative action to effectuate the policies of the National Labor Relations Act:

(a) Require that its officials, superintendents and employees having authority to hire or discharge do not in any way urge, persuade, warn or coerce its employees, or any of them, or in any manner influence or attempt to influence said employees to form, join, assist or participate in any labor organization, or not to form, join, assist or participate in any labor organization;

(b) Take all reasonable steps and precautions to carry out and effectuate the provisions of Paragraph 2 (a) above;

(c) Post, and maintain continuously from the date of this Order to and including August 15, 1940, at a conspicuous place in each department of its plant at Sacramento, notices containing a true and correct copy of this Order;

(d) Notify the Regional Director for the Twentieth Region within ten (10) days the steps respondent has taken to comply with this Order.

3. Respondent, California Processors and Growers, Inc., its officers and agents, successors and assigns,

shall cease and desist from engaging in any of the activities set forth in Paragraph 1 hereof, whether individually or in a representative capacity.

4. Nothing in this Order shall in any way affect the operation of that certain contract, dated April 4, 1939, now in force and effect between the California State Federation of Labor, Cannery Workers' Union Local No. 20324, A. F. of L., and California Processors and Growers, Inc., and Bercut-Richards Packing Co. and nothing in this Order shall impose upon Bercut-Richards Packing, or the California Processors and Growers, Inc., any obligation, restriction, liability or disability, whether affecting their right to enter into collective bargaining contracts with any representatives of their employees as provided in the National Labor Relations Act, as construed from time to time by Courts of competent jurisdiction, or any other right, or otherwise, except as provided in the National Labor Relations Act, or in the event of any amendment of said Act, then as provided in said Act as amended.